Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.
2016 NY Slip Op 32340(U)
November 28, 2016
Supreme Court, New York County
Docket Number: 650928/2016
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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Alden Global Value Recovery Master Fund, L.P., derivatively on behalf of J.P. Morgan Chase Commercial Mortgage Securities Trust Series 2007-CIBC18,

Plaintiff,

-against-

KeyBank National Association and Berkadia Commercial Mortgage LLC,

Defendants,

-and-

Wells Fargo Bank N.A., in its capacity as Trustee of J.P. Morgan Chase Commercial Mortgage Securities Trust Series 2007-CIBC18,

Nominal Defendant.

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Index No.: 650928/2016

DECISION AND ORDER
Motion Seq. 001, 002

HON. ANIL C. SINGH:

In this action for breach of contract of an Amended and Restated Pooling and Servicing Agreement, dated February 27, 2012 (the "PSA") and declaratory judgment, defendants Keybank National Association ("Keybank") and Berkadia Commercial Mortgage LLC ("Berkadia") (collectively, "defendants") move to dismiss the verified complaint. Plaintiff Alden Global Value Recovery Master Fund, L.P. ("Alden") opposes.

Motion Sequence 001 and 002 are consolidated for disposition.

Plaintiff is a Certificateholder[1] and is suing derivatively on behalf of the J.P. Morgan Chase Commercial Mortgage Securities Trust Series 2007- CIBC18 (the "Trust"). Plaintiff has sued Keybank (also known as "the Special Servicer") and Berkadia (also known as "the Master Servicer") for breach of the PSA that governs the Trust of which defendant Wells Fargo Bank, N.A. is the trustee (the "Trustee").

The loan at issue is a commercial mortgage loan on the Bryant Park Hotel. The loan went into default around October 2011. As a result of this default, the

[1] "Certificateholder" or "Holder" is defined in the PSA as, "The Person in whose name a Certificate is registered in the Certificate Register; provided, however, that solely for the purposes of giving any consent, approval or waiver pursuant to this Agreement, any Certificate registered in the name of the Master Servicer, the Special Servicer, the Trustee, the Paying Agent, the Depositor, or any Mortgage Loan Seller or any Affiliate thereof shall be deemed not to be outstanding, and the Voting Rights to which it is entitled shall not be taken into account in determining whether the requisite percentage of Voting Rights necessary to effect any such consent, approval or waiver has been obtained, if such consent, approval or waiver sought from such party would in any way increase its compensation or limit its obligations as Master Servicer, Special Servicer, Depositor or Trustee, as applicable, hereunder; provided, however, so long as there is no Event of Default with respect to the Master Servicer or the Special Servicer, the Master Servicer and the Special Servicer or such Affiliate of either shall be entitled to exercise such Voting Rights with respect to any issue which could reasonably be believed to adversely affect such party's compensation or increase its obligations or liabilities hereunder; and provided, further, however, that such restrictions shall not apply to the exercise of the Special Servicer's rights (or the Master Servicer's or any Mortgage Loan Seller's rights, if any) or any of their Affiliates as a member of the Controlling Class. The Trustee and the Paying Agent shall each be entitled to request and rely upon a certificate of the Master Servicer, The Special Servicer or the Depositor in determining whether a Certificate is registered in the name of an Affiliate of such Person. All references herein to "Holders" or "Certificateholders" shall reflect the rights of Certificate Owners as they may indirectly exercise such rights through the Depository and the Depository Participants, except as otherwise specified herein; provided, however, that the parties hereto shall be required to recognize as a "Holder" or "Certificateholder" only the Person in whose name a Certificate is registered in the Certificate Register."

loan became a Defaulted Mortgage Loan[2] and a Specially Serviced Mortgage Loan, and servicing of the loan was transferred from Berkadia to KeyBank.

Under the PSA, when a mortgage loan becomes a Defaulted Mortgage Loan, the Controlling Class Option Holder has the option to purchase the defaulted loan from the Trust at the Option Price. In April 2015, the Controlling Class Option Holder notified the Trust that it desired to exercise its purchase option and purchase the loan at issue.

Keybank, as Special Servicer, was tasked with determining the "fair value" of the loan. Berkadia was tasked with performing its duties as Master Servicer in reviewing Keybank's fair value determination. In the verified complaint, plaintiff alleges that Keybank and Berkadia failed to comply with their obligations under the PSA in determining the fair value of the loan. In particular, plaintiff alleges that Keybank placed its reliance on a single appraisal from Cushman & Wakefield. Plaintiff alleges that the loan was sold for less than $60 million utilizing the "fair value" purchase option. As a result, the trust did not recover the full $85.5 million value of the loan. Subsequently, the loan was restructured and refinanced. The lender valued the property at $100 million. Plaintiff alleges that the investors in the trust lost more than $25 million.

[2] Words that are capitalized are defined terms under the PSA.

Section 12.03(c) of the PSA (also known as a "no-action clause") lays out the way in which a Certificateholder can institute suit. In this action, defendants argue that Alden does not meet the requirements to institute suit and, hence, has no standing.

Analysis

Standard on Motion to Dismiss

On a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. See, Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See, Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be

given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

First Cause of Action for Breach of Contract

Standing to sue

There is no dispute here that Section 12.03 is the limited means by which plaintiff, as Certificateholder, can institute suit. Section 12.03 states:

> **Section 12.03** Limitation on Rights of Certificateholders
>
> **(c)** No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement or any Mortgage Loan, unless, with respect to any suit, action or proceeding upon or under or with respect to this Agreement, **such Holder previously shall have given to the Trustee and the Paying**

> **Agent a written notice of default hereunder, and of the continuance thereof, as herein before provided, and unless also** (except in the case of a default by the Trustee) **the Holders of Certificates of any Class evidencing not less than 25% of the related Percentage Interests in such Class shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding.**

(emphasis added)

The No-Action Clause, section 12.03(c), establishes four requirements that plaintiff must meet before asserting claims on behalf of the Trust on its own. First, plaintiff has to provide the "Trustee and Paying Agent a written notice of default hereunder, and of the continuance thereof, as herein before provided." Second, plaintiff must be a holder of twenty-five percent of a class of certificates. Third, plaintiff must make a written request of the Trustee to institute an action and must offer the Trustee reasonable indemnity against the cost and expense in pursuing the action. Fourth, sixty days must pass during which the Trustee has refused to institute an action.

Defendants argue that the No-Action Clause requires an Event of Default under Section 7 of the PSA. When read together, defendants argue that plaintiff has no standing to sue. Plaintiff counters that Section 12.03 is to be read alone.

Section 7 concerns the removal of a servicer, whereas Section 12 relates to suing a servicer. Accordingly, plaintiff urges that it has met the requisite requirements set forth in Section 12 and has standing to sue.

In ACE Securities Corp. v. DB Structured Products, Inc., 112 A.D.3d 522 (1st Dept 2013), aff'd, ACE Securities Corp. v. DB Structured Products, Inc., 25 N.Y.3d 581 (2015), plaintiff sued for breach of representations and warranties relating to the securitization of mortgage loans under a mortgage loan agreement and a pooling and servicing agreement. The First Department held that the certificate holders did not have standing to sue derivatively. The court reasoned that "[t]he 'no-action' clause in § 12.03 of the PSA sets forth as a condition precedent to such an action that the certificate holders provide the trustee with 'a written notice of default and of the continuance thereof.'" The court stated that "the defaults enumerated in the PSA [as enumerated in Section 7 of the PSA in that case] concern failures of performance by the servicer or master servicer only." Therefore, the PSA did not permit certificate holders to issue a notice of default relating to the sponsor's breach of representations.

Similarly, in Walnut Place LLC v. Countrywide Home Loans, Inc., 96 AD3d 684, 684 (1st Dept 2012), the court held that "plaintiff certificate holders' action is barred by the 'no-action' clause in the PSAs, which plainly limits certificate

holders' right to sue to an 'Event of Default,' which, under section 7.01 of the PSAs, involves only the master servicer".[3]

Plaintiff's argument that Article 7 only relates to the procedures applicable to removal of a servicer is without merit. Section 7.01(a)(i) to (x) delineates the ten events that constitute defaults under the PSA. Section 7.01(b) provides the remedy for such defaults, which includes the removal of the servicer. The remedy may be exercised only by the Trustee or the Depositor "at the written direction of the Directing Certificate Holder or Holders of certificates entitled to at least 51% of the Voting Rights." (Section 7.01(b)).

Moreover, Section 12.03 provides specifically that a default as defined under the provision is "as herein before provided," referring to an earlier section of the PSA. See e.g., 149 Madison LLC v. Bosco, 103 A.D.3d 523, 524 (1st Dept 2013) (construing "hereinbefore provided" as referring to a previous portion of the lease). Accordingly, the preconditions set forth in both Section 7.01(a)(iii) and Section 12.03 must therefore be met before plaintiff as Certificateholder can institute suit.

Here, plaintiff fails to plead satisfaction of the first requirement under Section 12.03(c) to provide the "Trustee and Paying Agent a written notice of

[3] The court notes that the no-action clause in Walnut Place explicitly referred to an "Event of Default." In any event, the no-action clause was read together with the event of default.

default hereunder, and of the continuance thereof, as herein before provided." This is because plaintiff has not declared an Event of Default pursuant to 7.01(a)(iii).

Plaintiff alleges that it represents at least 25% of the Class C group of Certificateholders. However, the precondition as set forth in 7.01(a)(iii) requires that the notice be given by "the Holders of Certificate evidencing Percentage Interests aggregating not less than 25%" of the entire loan, not of a certain class. Therefore, plaintiff's allegation is insufficient as there is no provision that allows a single class to provide notice on behalf of all certificateholders in the trust.

For these reasons, plaintiff does not have the right to declare a default under the PSA and lacks standing to sue defendants.

Fair Value of the Bryant Park Loan

In light of the above disposition, the court declines to consider Berkadia's alternative argument that plaintiff's breach of contract claim should be dismissed because, as the Master Servicer, it may rely conclusively on a third-party appraisal written by Cushman & Wakefield in determining the fair value of the loan.

Amending the Complaint

The court denies plaintiff's motion for leave to amend pleadings.

Pursuant to CPLR 3025(b), the court will grant leave to amend "absent prejudice or surprise resulting therefore, unless the proposed amendment is palpably insufficient or patently devoid of merit." MBIA Ins. Corp. v. Greystone & Co., 74 A.D.3d 499, 499 (1st Dept 2010) (citations omitted). "Plaintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." Id. at 500 (citations omitted); see also Wattson v. TMC Holdings Corp., 135 A.D.2d 375, 377 (1st Dept 1987) ("The requirements for obtaining leave to amend ... include an evidentiary demonstration ... that the party has good ground to support his cause of action") (internal quotations and citations omitted).

Here, plaintiff has not included any evidence to support its causes of action against defendants. Accordingly, it is hereby,

ORDERED that defendant Keybank's motion to dismiss plaintiff's complaint is granted without leave to amend; and it is further

ORDERED that defendant Berkadia's motion to dismiss plaintiff's complaint is granted without leave to amend.

Date: November 28, 2016
New York, New York

Anil C. Singh